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No. 82-415

IN THE

# Supreme Court of The United States

October Term, 1982

JOHN N. ROBINSON,

Petitioner

vs.

GEORGE J. MAGOVERN, CARDIO-THORACIC SURGICAL ASSOCIATES, INC. and ALLEGHENY GENERAL HOSPITAL,

Respondents

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit at No. 81-2726

## BRIEF FOR CARDIO-THORACIC SURGICAL ASSOCIATES, INC. IN OPPOSITION TO PETITION FOR CERTIORARI

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## QUESTIONS PRESENTED

I. Did the District Court properly deny the applicability of the crime-fraud exception to the attorney-client privilege?

II. Did the District Court properly exempt from production, documents containing the mental impressions, conclusions, opinions and legal theories of an attorney of a party made in the anticipation of litigation?

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## OPINIONS OF THE COURTS BELOW

Petitioner, Dr. John N. Robinson ("Robinson"), appealed to the United States Court of Appeals for the Third Circuit from orders of the United States District Court for the Western District of Pennsylvania (1) granting summary judgment in favor of the defendants on his civil rights and federal common law claims and (2) entering judgment after trial on his antitrust and pendent state law claims. The Court of Appeals Ordered and Adjudged that the judgment of the District Court was affirmed, taxed costs in favor of the appellees and stated simply: "We find no error." A subsequent petition for rehearing en banc was denied.

In the only opinion of the District Court to deal with the issues here presented, the late Judge Snyder denied petitioner's request for production of documents as protected by either the attorney-client privilege, the work product doctrine, or both. In the Memorandum Opinion of April 11, 1980, at footnote 4 (Appendix to Petition at 179a), the District Court expressly rejected the claim of Dr. Robinson that because the pertinent communications contained in the documents were issued in furtherance of an alleged, on-going conspiracy to exclude him from Allegheny General Hospital by denying him staff privileges, no attorney-client privilege attached. Judge Snyder stated that upon a full examination of the record it was his finding that Dr. Robinson had not offered any evidence to indicate that the advice of the attorney was sought, or given, in furtherance of a crime or tort; there was found to be no *prima facie* case establishing that the attorney was used to promote an intended, continuing criminal or fraudulent activity. An Order was entered on April 22, 1980 amending the April 11 Order with regard to the November 26, 1975 memorandum of Richard

Ashton.[1] These findings were adhered to by Judge Cohill following his assignment to the case upon the death of Judge Snyder.

Thus, the District Court expressly rejected Dr. Robinson's attempts to invoke the crime-fraud exception to the attorney-client privilege. Likewise, the Court of Appeals for the Third Circuit, following consideration of briefs and oral arguments on this issue, found the crime-fraud exception inapplicable to the facts presented in this case.

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## JURISDICTION

The Court of Appeals for the Third Circuit issued a Judgment Order on May 11, 1982 affirming the judgment of the District Court for the Western District of Pennsylvania. A petition for rehearing, en banc, filed by Dr. Robinson was denied by the Third Circuit Court of Appeals on June 15, 1982.

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

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[1] Petitioner, in footnote 6 to its Petition (Petition at 6), challenges the District Court's decision to protect this document on the basis that Ashton was not an attorney at the time the memorandum was written. It is precisely this matter which is dealt with in the Order of April 22, 1980. The Court there held that the document at issue was not entitled to attorney-client privilege, but, nevertheless, the document was protected by the work product doctrine.

## STATEMENT OF THE CASE

The documents to which the petitioner, Dr. Robinson, points have been adjudged to be protected under the attorney-client privilege, the work product doctrine, or both. At a hearing before the late Judge Daniel J. Snyder on October 26, 1976, it was ordered, with agreement of counsel, that five documents withheld by Dr. Magovern, and/or Allegheny General Hospital ("AGH"), be submitted to United States Magistrate Ila Jeanne Sensenich of the Western District of Pennsylvania for a determination of work product and attorney-client privilege claims. The Magistrate initially upheld the privileges as to some of the submitted documents but denied them as to others. Upon reconsideration, having considered submissions of fact, briefs, oral arguments and the documents themselves, the Magistrate ruled that each document was protected by the attorney-client privilege, the work product doctrine, or both. Following issuance of the revised order of the Magistrate, the matter was appealed by Dr. Robinson for a determination *de novo* by Judge Snyder. After this *de novo* proceeding, which included an *in camera* inspection of the documents, an Order was entered, with regard to all documents under consideration, denying the motion of Dr. Robinson to compel disclosure.

The Court found that all of the documents were prepared after receipt of a threatening letter written by Dr. Robinson's attorney. The letter stated:

> This office has been retained by Dr. John N. Robinson who has advised us that his several attempts to be favorably considered for admission to your surgical staff have been frustrated by the personnel of your hospital. After I learned of Dr. Robinson's credentials, I was frankly surprised that

an appointment of Dr. Robinson to your staff had not been made. The information I have received on this case leads to the conclusion that your failure to process my client's application to a just conclusion in accordance with the various applicable statutes and regulations governing the operation of hospitals like yours has caused our client serious damage.

I would be grateful if you would advise me as soon as possible the reasons for your failure to justly process Dr. Robinson's request to join your surgical staff. If your actions are supported by by-laws or other governing rules of the hospital, please submit a copy of these documents to me. I would appreciate, as well, your sending a copy of your written rules and regulations covering applications for staff membership, methods of processing applications, procedures related to submission and processing of applications and particularly your defined criteria for staff membership.

I will be happy to meet with a representative of your hospital to further discuss the problem presented by what has occurred since Dr. Robinson first attempted to file an application for membership on your staff. Since Dr. Robinson's extensive damages to date are continuing, I submit that it is necessary that the problem be resolved with minimal delay. If, of course, I do not receive an indication from you of a desire to resolve this problem within the next 15 days, I will have no further choice but to institute appropriate legal proceedings for the benefit of Dr. Robinson.

In fact, Dr. Robinson had never submitted an application prior to the letter even though he had been told by

Dr. Magovern where to go to get one over four months before the letter was written.

The Court found that this threat of litigation was considered seriously by the Hospital and as a result the consultation of its general counsel was sought throughout the consideration of Dr. Robinson's application. Petitioner's attempt to subpoena the documents at trial for introduction into evidence was similarly rebuffed and respondents' objections were sustained.

Dr. Magovern was the Director of Surgery at AGH at all times relevant to this case. He was also Chief of the Division of Thoracic Surgery which is a Division of the Department of Surgery. Dr. Robinson applied for medical staff privileges in the area of thoracic surgery at AGH. In the process of holding certain of the documents here at issue to be within the protection of the attorney-client privilege, the District Court made several findings of fact with respect to the role Dr. Magovern played in the decision making process. As Director of Surgery and Chief of the Division of Thoracic Surgery, Dr. Magovern initially interviewed Dr. Robinson, solicited letters of recommendation and prepared a recommendation to the Credentials Committee. Because of Dr. Magovern's involvement in the application process, counsel for the Hospital consulted with Dr. Magovern and advised him as to the legal aspects of the Robinson application process. The Court acknowledged that Dr. Magovern was not a member of the Board of Trustees whose responsibility it was to make the final decision on staff privileges, but nevertheless found that Dr. Magovern's roles as Director of the Department of Surgery and head of the Division of Thoracic Surgery afforded him a substantial part in the decision making process. (Appendix to Petition at 175a.)

## REASONS FOR DENYING WRIT

### A. The Decision Below was Correct on the Merits.

#### 1. THE DISTRICT COURT PROPERLY DENIED THE APPLICABILITY OF THE CRIME-FRAUD EXCEPTION TO THE ATTORNEY-CLIENT PRIVILEGE BASED ON PETITIONER'S FAILURE TO ESTABLISH A *prima facie* CASE THAT THE PROTECTED DOCUMENTS CONTAINED COMMUNICATIONS MADE IN AN ATTEMPT TO PROMOTE AN INTENDED, CONTINUING, ILLEGAL ACTIVITY.

The need for special treatment of communications between an attorney and his client is well recognized and unquestioned. The policy underlying the attorney-client privilege is based on considerations that are entrenched in the framework of American legal thought: the desire to promote freedom of consultation and full disclosure of information between a client and its legal advisor. To effectuate this goal, the apprehension of possible compelled disclosure by such legal advisors has been removed. As stated in the recent Supreme Court decision in *Upjohn Co. v. United States*, 449 U.S. 383 (1981):

> Its purpose is to encourage the full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer being fully informed by his client.

449 U.S. at 389. That decision also dealt with the definition of the scope of the privilege. That Court stated:

> . . . the privilege exists to protect not only the giving of professional advice to those who can act on it but

> also the giving of information to the lawyer to enable him to give sound and informed advice.

*Id.* at 390.

In its Petition for Writ of Certiorari, petitioner abandons its assertion that the communications at issue are not within the scope of the attorney-client privilege, but rather relies solely on the applicability of the crime-fraud exception to remove these communications from the protection afforded by the attorney-client privilege. It appears from the petition that Dr. Robinson challenges, by way of this argument, only the applicability of the attorney-client privilege.

The first of petitioner's arguments focuses on what it terms the "extremely troublesome" issue stated by petitioner as follows: "... does the exception apply only to the technical tort of fraud, or does it extend as well to other torts involving dishonest or specific intent?" (Petition at 10). The "troublesome" nature of this issue is belied by the absence of judicial concern. The very cases cited by petitioner indicate that the courts have not viewed this issue as significant. This is exemplified in *In re Grand Jury Proceedings (FMC Corp.)*, 604 F.2d 798 (3d Cir. 1979) where, in its discussion of the crime-fraud exception, the Court states:

> The ultimate aim is to promote the proper administration of justice. That end, however, would be frustrated if the client used the lawyer's services to further a continuing or future crime or tort. Thus, even when the lawyer is consulted, not with respect to past wrongdoing but to future illegal activities, the privilege is no longer defensible and the crime-fraud exception comes into play. [footnotes omitted.]

604 F.2d 802. The fact that several opinions dealing with this issue use these terms interchangeably, and that no

court has addressed the issue as one of any importance, greatly undermines petitioner's assertion that this is a "troublesome" issue. Moreover, in none of the opinions cited by petitioner, nor in any case addressing the crime-fraud exception, is there any mention of the applicability of the exception to torts involving specific intent.

Petitioner has failed to establish that there is a material split among the courts of appeal as to the scope of "crime-fraud." Nowhere has the exception been extended specifically to encompass all torts involving specific intent. On the other hand, no court has held that the application of the exception is limited solely to criminal activity or fraud. It appears the formulation of this issue has been manufactured by petitioner, without any precedent to support it, in an attempt to suit the factual situation presented.

The determination of whether a sufficient showing has been made to invoke the crime-fraud exception has been committed to the sound discretion of the trial court. *In re Sealed Case*, 676 F.2d 793, 813 (D.C. Cir. 1982). While appellate courts do not hesitate to correct any error that clearly appears on the face of the record in this regard, *Id.* at 813, the Court of Appeals for the Third Circuit, after a review of the trial record and appellate briefs and following oral argument on this issue, upheld the discretion of the District Court and held that there was no error. This finding, upheld by the Court of Appeals, is not the type of issue appropriate for review by this Court. Petitioner states that it does not seek review by the Supreme Court of the voluminous record below related to conspiracy and intent (Petition at 8), yet it bases its entire argument on the assertion that the protected documents would make a material difference to the evaluation of those very issues. The only way it can

be determined whether the protected documents were indeed material, is by a review of the entire voluminous record. The petitioner himself acknowledges that he received thousands of documents from the defendants. Hundreds of documents were introduced as exhibits. The trial transcript, excluding admitted depositions, totalled 8,495 pages. This Court should not be asked to determine the materiality of five documents without the benefit of analyzing the entire record.

Petitioner recognizes that the Third Circuit has opted for the more expansive interpretation of the scope of the crime-fraud exception. The opinion in *In re Grand Jury Proceedings (FMC Corp.)*, 604 F.2d 798, 802 (3d Cir. 1979) states the exception comes into play with continuing or future crimes or torts. It was this expansive interpretation that was controlling on the decisions below. Notwithstanding the application of this expansive interpretation, the District Court held, and the Third Circuit affirmed, that the documents at issue were not within the scope of the crime-fraud exception. Petitioner cannot now argue that there is a material split of authority. Its contentions have been analyzed under the interpretation most favorable to it. Reconciliation of the two interpretations, no matter how structured, could not benefit petitioner. It has exercised its right of appeal through the more expansive interpretation and has had its arguments heard under terms most favorable to it. Petitioner cannot properly be heard to complain of the existence of a conflict among the circuits nor may it point to the existence of other, more restrictive, interpretations to justify review of the District Court's factual holdings.

The second focus of petitioner's argument is the burden of proof required to invoke the crime-fraud exception. Petitioner again alleges a conflict between decisions

from the courts of appeals. This alleged conflict centers on whether the decision of the District Court as to the *prima facie* showing of illegality should be based on evidence independent of the documents themselves or after an *in camera* examination of the documents at issue. Once again petitioner has had its claims considered under the standard most favorable to its position and cannot now use the existence of such an apparent conflict to have its arguments heard yet again.

In the instant case the distinction urged by petitioner is wholly irrelevant. Petitioner states that "mere inspection" of the documents would have persuaded the Court as to the significance of the documents and would have resulted in their admission into evidence. (Petition at 12) Both the federal Magistrate and the District Court did, in fact, examine the documents prior to rendering their decisions. They nevertheless concluded that there was no justification for invoking the crime-fraud exception. The District Court addressed this issue on the basis most favorable to petitioner and held that the documents were properly protected under the attorney-client privilege.

Petitioner seeks to characterize the District Court's denial of a Motion for Involuntary Dismissal as proof that a *prima facie* case had "clearly been established." (Petition at 13) Federal Rule of Civil Procedure 41(b), dealing with involuntary dismissals states, in pertinent part:

> The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence.

28 U.S.C. Fed. R. Civ. Proc. Rule 41(b). The trial judge may conclude that it is inadvisable to sustain the defend-

ant's motion midway in the trial and that the trial should be completed. The denial amounts to no more than a refusal to enter judgment at that time, a tentative and inconclusive ruling on the question of the plaintiff's proof. *Weissinger v. United States*, 423 F.2d 795, 797 (5th Cir. 1970). Denial of such a motion is not a ruling that plaintiff has established a *prima facie* case.

2. THE MENTAL IMPRESSIONS, CONCLUSIONS, OPINIONS AND LEGAL THEORIES OF COUNSEL OF A DEFENDANT PREPARED IN THE ANTICIPATION OF LITIGATION WERE PROPERLY EXEMPTED FROM PRODUCTION AT TRIAL.

Petitioner challenges as unduly expansive the District Court's application of the work product doctrine. (Petition at 15) The doctrine was initially recognized in *Hickman v. Taylor*, 329 U.S. 495 (1947) and is codified in Federal Rules of Civil Procedure 26(b)(3). In essence, the doctrine shields from discovery those materials prepared or collected "in the course of preparation for possible litigation." *Id.* at 505. The doctrine applies to both criminal and civil litigation. *In re Grand Jury Investigation (Sun Co.)*, 599 F.2d 1224 (3d Cir. 1979).

A variety of formulas have been postulated with regard to the determination of whether the preparation, collection or creation of the material in question was "in the course of preparation for possible litigation." The standard applied in *Home Insurance Co. v. Ballenger Corp.*, 74 F.R.D. 93 (N.D. Ga. 1977) required a showing that "substantial probability that litigation will occur and that the commencement of such litigation is imminent." *Id.* at 101. The necessary connection between the creation of the material and the prospect of litigation has also been characterized as action taken in response to a threat of litigation that is "real and imminent." *In re*

*Grand Jury Investigation (Sturgis)*, 412 F.Supp. 943 (E.D.Pa. 1976), or a prospect of litigation that is "identifiable," *Stix Products, Inc. v. United Merchants & Manufacturers, Inc.*, 47 F.R.D. 334, 337 (S.D.N.Y. 1969). An oft-cited statement of the test appears in 8 C. Wright and A. Miller, Federal Practice and Procedure, §2024, at 198 (1970):

> Prudent parties anticipate litigation, and begin preparation prior to the time the suit is formally commenced. Thus the test should be whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.

Under any of these tests, the prospect of litigation at the time of the genesis of the documents here under consideration was sufficiently real to mandate work product protection. The documents at issue were prepared subsequent to the letter sent by petitioner's attorney to the Chief Administrative Officer of Allegheny General Hospital. *(supra* at 3-4.) As recognized by Judge Snyder in his opinion of April 11, 1980, "the letter of Attorney Roslyn Litman threatened legal action in the event Robinson was not satisfied in his attempt to file an application for membership on AGH's medical staff and the Document was prepared in response to that letter and in anticipation of litigation." *Robinson v. Magovern*, Memorandum Opinion at 7 (Appendix to Petition at 176a).

The validity of the work product doctrine was recently reaffirmed by this Court in *Upjohn Co. v. United States*, 449 U.S. 383 (1981). The Court cited *Hickman v. Taylor*, 329 U.S. 495 (1947) and quoted from that case as follows:

> . . . much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served. [Hickman v. Taylor,] *Id.*, at 511, 67 S.Ct., at 393-394.

449 U.S. at 398.

Petitioner attempts to void the District Court's holding applying the work product doctrine in much the same way as it attacked the attorney-client privilege. The arguments set forth above showing that the crime-fraud exception is inapposite to the documents protected by the attorney-client privilege (*supra* at 7 et seq.) are equally persuasive as applied to work product and need not be restated in full.

Petitioner has failed to demonstrate, under any standard, a *prima facie* case of illegality necessary to invoke the crime-fraud exception or any analogous theory. In view of such failure, petitioner has not justified its attempt to set aside the protection granted to work product. The supposed ramifications of applying the work product doctrine to the documents here at issue stated by Petitioner (Petition at 15) are simply *reductio ad absurdum*. The clear fact remains that the documents sought by petitioner were prepared after receipt of the letter from petitioner's counsel threatening litigation and the documents were prepared in anticipation of possible litigation.

Documents embodying the mental impressions of counsel, his legal conclusions, factual analysis and strat-

egy are always inviolate and not discoverable. 28 U.S.C. Fed. R. Civ. Proc. Rule 26(b)(3). The determination of whether there has been a sufficient showing of "exceptional circumstances" under *Hickman v. Taylor, supra*, is largely a matter of discretion. *Kearney & Trecker Corp. v. Giddings & Lewis Inc.*, 296 F. Supp. 979, 982 (E.D. Wisc. 1969). The decided cases place the burden squarely upon the party seeking discovery of a lawyer's work product to establish adequate justification for production. *Id.* at 981-982.

The "fraud" exception to the work product rule proposed by petitioner, and referred to in *Upjohn*, was discussed in some detail in the recent case of *In re Doe*, 662 F.2d 1073 (4th Cir. 1981), *cert. denied*, ___ U.S. ___, 102 S.Ct. 1632 (1982). The Court of Appeals there stated:

> We believe that it is the sense of *Upjohn*, *In re Grand Jury Investigation*, 599 F.2d 1224 (3d Cir. 1979), and *In re Special September 1978 Grand Jury*, 640 F.2d 49 (7th Cir. 1980), that while the protection of opinion work product is not absolute, only extraordinary circumstances requiring disclosure permit piercing the work product doctrine. We acknowledge that the opinion work product rule should be jealously guarded to foster the general policy expressed by *Hickman*, Rule 26(b)(3) and *Duplan I.* [*Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 487 F.2d 480 (4th Cir. 1973)]. While we will not attempt to catalogue all conceivable extraordinary circumstances which would make the fraud exception available, they inevitably exist when an attorney, charged as a fiduciary in the administration of justice, attempts to use the opinion work product

> rule to shield himself from criminal prosecution arising from actions in prior litigation.

662 F.2d at 1079-1080.

The work product sought by Petitioner does not involve the "extraordinary circumstances" referred to in *In re Doe*, *Hickman v. Taylor*, and the other cases which refer to the immunity afforded an attorney's work product. Furthermore, while the work product doctrine permits disclosure of some material prepared in the anticipation of litigation on a showing of "substantial need" or "undue hardship," Rule 26(b)(3) provides that even when the "required showing" of need has been made, the court "shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." 28 U.S.C. Fed. R. Civ. Proc. Rule 26(b)(3).

As discussed in detail above (p. 3) the District Court had examined the protected documents, studied briefs and heard oral argument on the validity of work product protection in this case. With this information at its disposal, the District Court held that the work product doctrine applied and further held that petitioner had failed to demonstrate extraordinary circumstances necessary to overcome the protection afforded to work product prepared in the anticipation of litigation. The Court of Appeal affirmed. For this Court to make a reasoned analysis of the determinations made by the District Court and the existence of extraordinary circumstances, a full review of voluminous records would be necessary. This is not a task properly posed to this Court. The findings of the District Court, as affirmed by the Court of Appeals, should stand.

**B. The Issues Posed by Petitioner are Not the Type Properly Reviewed by the Supreme Court.**

It is well established that the United States Supreme Court will not grant certiorari to review evidence and discuss specific findings of fact. *United States v. Johnston*, 268 U.S. 220 (1925). It is precisely that type of review here sought by petitioner. In the April 11, 1980 Memorandum Opinion of Judge Snyder, as amended by the Order of April 22, 1980, the Court ruled that the documents which are the subject of this Petition were protected under the attorney-client privilege, the work product doctrine, or both. Petitioner has introduced no evidence to contradict these findings by the trial court. Questions such as these, which involve only issues of evidence and factual findings, are not suitable for review by this Court. *Id.* at 227.

Given the sizeable role discretion plays in the determinations made by trial courts in this area of the law, *Kearney & Trecker Corp. v. Giddings & Lewis, Inc.*, 296 F. Supp. 979, 982 (E.D. Wisc. 1969), not only will a decision on the facts presented in this case have a marginal effect on the status of the law in this area, the impact on the instant suit would be nil. The material contained in the protected documents is dwarfed when compared with the mass of evidence introduced in this case; the protected material is insignificant when compared to the totality of the evidence compiled.

Also militating against the abrogation of the attorney-client privilege in this case is the fact that during the period of discovery extensive depositions of Magovern, Feist, Sanders and Grapski were taken by petitioner. The deposition of Dr. Magovern extended over six days and totalled 1,072 pages of transcribed testimony. Dr. Feist, Chairman of the Credentials Com-

mittee of AGH was deposed and the transcript totalled almost 150 pages. The deposition of the President of AGH, Mr. Grapski, lasted four days and produced 457 pages of testimony. Mr. Sanders, Vice President of AGH was deposed for two days; a 267 page transcript was produced. Magovern, Feist and Grapski were also cross-examined at trial. The transcripts of these three witnesses' cross-examination alone total 2,016 pages.

With the exception of AGH's General Counsel, Mr. Blaxter (whom petitioner made no attempt to depose or call as a witness at trial), all of the parties to the disputed communications were subjected to extensive questioning. The facts underlying the privileged communications were explored. Any material contained in the privileged documents as to which the petitioner did not inquire is insignificant when compared to the totality of evidence compiled. Even if it were held that no privilege exists as to the protected documents, such error would be harmless; there would be no material impact on the District Court decision even if the findings challenged by petitioner were overturned. The judgment of the District Court, as affirmed by the Court of Appeals, should stand.

## CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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